Supreme Court, U.S.
FILED
041638 JUN 6 2005
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

In Re Video-Cinema Films, Inc.
Petitioner

ON PETITION FOR A WRIT OF MANDAMUS TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF MANDAMUS

Mike Meier
International Law Group, PLLC
1004 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
Phone: (202) 544-7745
Fax: (202) 544-7746
Attorney for Petitioner

No.

IN THE
SUPREME COURT OF THE UNITED STATES

In Re Video-Cinema Films, Inc.
Petitioner

ON PETITION FOR A WRIT OF MANDAMUS TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF MANDAMUS

Mike Meier
International Law Group, PLLC
1004 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
Phone: (202) 544-7745
Fax: (202) 544-7746
Attorney for Petitioner

QUESTION PRESENTED

May the U.S. Court of Appeals for the Second Circuit ignore three stipulations created and endorsed as Orders by its staff counsel, which unambiguously grant Petitioner the right to challenge attorneys' fees awards in three copyright cases after the entry of a final judgment adjudicating the amount of the fees, each providing that "[t]his stipulation shall not preclude any appeal from a final judgment which adjudicates the precise amount of any attorneys' fees awarded by the District Court"?

PARTIES TO THE PROCEEDING

The parties to this action are:

1. Video-Cinema Films, Inc., Petitioner/Plaintiff below, a one-man, New York, close corporation, owned and operated by Mr. Larry Stern of New York, NY.
2. The United States Court of Appeals for the Second Circuit, to whom the *Mandamus* is directed.
3. Cable News Network, Inc. d/b/a CNN, Defendant below, a subsidiary of Time Warner, Inc., a publicly traded corporation.
4. American Broadcasting Companies, Inc., Defendant below, operates ABC Television Network, a subsidiary of Walt Disney Corporation, a publicly traded entity.
5. CBS Corporation, Defendant below, is the indirect parent corporation of the CBS Television Network, which is a subsidiary of Viacom, Inc., a publicly traded corporation.

TABLE OF CONTENTS

QUESTION PRESENTED 2
PARTIES TO THE PROCEEDING 3
TABLE OF CONTENTS 4
TABLE OF AUTHORITIES 5
STATEMENT OF JURISDICTION 7
OPINIONS BELOW 8
STATUTES AND RULES INVOLVED 10
STATEMENT OF THE CASE 12
ARGUMENT 15
THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT CANNOT IGNORE THREE STIPULATIONS IT ENDORSED AS ORDERS. EACH UNAMBIGUOUSLY STATES THAT "THIS STIPULATION SHALL NOT PRECLUDE ANY APPEAL FROM A FINAL JUDGMENT WHICH ADJUDICATES THE PRECISE AMOUNT OF ANY ATTORNEYS' FEES AWARDED BY THE DISTRICT COURT." 15
RELIEF REQUESTED 19
CONCLUSION 20
APPENDIX A-1

TABLE OF AUTHORITIES

Cases	Page
Lichtenberg v. Besicorp Group, Inc., 204 F.3d 397 (2d Cir. 2000).	18
Moore v. South Carolina Labor Board, 100 F.3d 162 (D.C. Cir. 1996).	15,16,17
Rezzonico v. H & R Block, Inc., 182 F.3d 144 (2d Cir. 1999).	17
United States of America ex rel. McAllan v. City of New York, 248 F.3d 48 (2d Cir. 2001).	18
Ex parte Bradley, 74 U.S. 364 (1868).	7
Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962).	16
Osterneck v. Ernst & Whinney, 489 U.S. 169 (1989).	16,17,18
Thompson v. INS, 375 U.S. 384 (1964).	16
Wolfsohn v. Hankin, 376 U.S. 203 (1964).	16

Statutes	**Page**
Title 28 U.S.C. § 1651(a)	7,10
Title 17 U.S.C. § 505	12
Federal Rules of Civil Procedure	
Fed. R. Civ. P. § 54(d)(2)(B)	10,12,19
Fed. R. Civ. P. § 58(a)(1)	10
Fed. R. Civ. P. § 58(a)(1)(C)	14
Fed. R. Civ. P. § 58(b)(2)	11,18
Fed. R. App. P. § 4(a)(1)(A)	13,14

STATEMENT OF JURISDICTION

This Petition for a Writ of Mandamus arises from a decision of the United States District Court for the Southern District of New York, Jones, J., awarding attorneys' fees to Defendants in three copyright suits, and the subsequent dismissal of Petitioner's appeals of these attorneys' fees rulings by the United States Court of Appeals for the Second Circuit.

The All Writs Act, 28 U.S.C. § 1651(a), forms the statutory basis for the general power of this Court to issue a *Writ of Mandamus* directed to lower federal courts handling civil actions.

Petitioner has standing since it is the affected party in the proceedings below. The U.S. Court of Appeals for the Second Circuit denied Petitioner the right to perfect its appeals and subsequently denied its motions for rehearing and rehearing *en banc* on March 7, 2005. As a result, Petitioner has exhausted all other remedies below.

A *Writ of Mandamus* is applicable in the supervision of the proceedings of lower courts in cases where there is a legal right without any existing legal remedy. *Ex parte Bradley*, 74 U.S. 364 (1868).

This petition is timely because under Supreme Court Rule 30 it was filed within ninety days of March 7, 2005, the date the U.S. Court of Appeals for the Second Circuit denied reconsideration of Petitioner's appeals.

OPINIONS BELOW

NOTE: In the interest of conserving judicial resources, Petitioner is submitting a single Petition for the *Writ of Mandamus*, even though the U.S. District Court issued three separate attorneys' fees awards, and the U.S. Court of Appeals for the Second Circuit endorsed three stipulations as Orders, as explained below.

Dismissal of Motions for rehearing and rehearing *en banc* by Second Circuit:

Video-Cinema Films, Inc. v. American Broadcasting Companies, Inc., No. 04-3197-cv (March 7, 2005) (Appendix at 2)

Video-Cinema Films, Inc. v. CNN, Inc., No. 04-3196 (March 7, 2005) (Appendix at 5)

Video-Cinema Films, Inc. v. CBS, No. 04-3199 (March 7, 2005) (Appendix at 8)

Dismissal of Appeal by Second Circuit:

Video-Cinema Films, Inc. v. Cable News Network, Inc., Nos. 98-cv-7128, 98-cv-7129, 98-cv-7130 (November 24, 2004) (Appendix at 18)

Decision of the District Court awarding attorneys' fees to the Defendants:

Video-Cinema Films, Inc. v. Cable News Network, Inc. d/b/a CNN, 98 Civ. 7128 (BSJ), 98 Civ. 7129 (BSJ), 98 Civ. 7130 (BSJ), 2004 U.S. Dist. LEXIS

1428, Copy.L.Rep. (CCH) P28, 754 (S.D.N.Y. February 3, 2004) (Appendix at 29)

Decision of the District Court granting summary judgment to the Defendants:

Video-Cinema Films v. Cable News Network, Inc., 98 Civ. 7128 (BSJ), 98 Civ. 7129 (BSJ), 98 Civ. 7130 (BSJ), 2001 U.S. Dist. LEXIS 15937, 60 U.S.P.Q.2d (BNA) 1415, Copy.L.Rep. (CCH) P28,327, 29 Media L.Rep. 2551 (S.D.N.Y. September 28, 2001).

STATUTES AND RULES INVOLVED

The All Writs Act, 28 U.S.C. § 1651(a) states:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Federal Rule of Civil Procedure 54(d)(2)(B) states:

> Unless otherwise provided by statute or order of the court, the motion [for attorneys' fees] must be filed no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of agreement with respect to fees to be paid for the services for which claim is made.

Federal Rule of Civil Procedure 58 states:

> (a) Separate Document
>
> (1) Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion:
>
> ...
>
> (C) for attorneys fees under Rule 54.
>
> ...
>
> (b) Time of Entry
>
> Judgment is entered for purposes of these rules:
>
> ...

(2) if Rule 58(a)(1) requires a separate document, when it is entered in the civil docket under Rule 79(a) and when the earlier of these events occurs:

(A) when it is set forth on a separate document, or

(B) when 150 days have run from entry in the civil docket under Rule 79(a).

STATEMENT OF THE CASE

Video-Cinema Films, Inc. (hereinafter "Video-Cinema" or "Petitioner") brought action for copyright infringement and other claims against CNN, CBS and ABC (hereinafter "Defendants"), for the unlicensed use of images of Robert Mitchum, as excerpted from the motion picture *The Story of G.I. Joe,* that were used in Mitchum's obituaries in 1997.

Video-Cinema seeks an opportunity to perfect its appeals before the U.S. Court of Appeals for the Second Circuit. The basis for the appeal will be that U.S. District Judge Barbara S. Jones awarded attorneys' fees to the Defendants, disregarding the plain language of Fed. R. Civ. P. 54(d)(2)(B) (motion for attorneys' fees must be filed within 14 days of entry of judgment). Judge Jones permitted the Defendants to file a Motion for attorneys' fees 19 days after the district court issued its judgment, in disregard of the time limits set in Rule 54(d)(2)(B). The judge also disregarded the prescription of the Rule, requiring a movant to state the amount of fees being sought or a fair estimate thereof, which Defendants failed to do.

Defendants never invoked Fed. R. Civ. P. 54 in seeking fees. The district court's decision does not refer to any Federal Rule of Civil Procedure, either. The motion is based solely on the Copyright Act, 17 U.S.C. § 505, in disregard of Fed. R. Civ. P. 54(d)(2)(B).

In 2001, the District Court granted the Defendants' motion for summary judgment. *Video-Cinema Films, Inc. v. Cable News Network, Inc.*, 98 Civ. 7128 (BSJ), 98 Civ. 7129 (BSJ), 98 Civ. 7130 (BSJ) (S.D.N.Y. 2001) (Appendix at A29).

Petitioner filed notices of appeals of any attorneys' fees awards. On August 3, 2004, at a CAMP conference with the Second Circuit's counsel Stanley A. Bass, Esq., the petitioner's notices of appeal were withdrawn as premature, with the Court providing the assurance that Video-Cinema could file its appeals once final judgments adjudicating the precise amount of fees were entered. The Court endorsed with a "SO ORDERED" the Stipulations Withdrawing Premature Appeal, each of which provided that "it shall not preclude any appeal from a final judgment which adjudicates the precise amount of any attorneys' fees awarded ..." (Appendix at A23-28)

On February 3, 2004, the District Court, Judge Barbara S. Jones, awarded Defendants CNN, ABC, and CBS a total of $299,790.09 in attorneys' fees. *See Video-Cinema Films, Inc. v. Cable News Network, Inc.* d/b/a CNN, 98 Civ. 7128 (BSJ), 98 Civ. 7129 (BSJ), 98 Civ. 7130 (BSJ), 2004 U.S. Dist. LEXIS 1428, Copy.L.Rep. (CCH) P28, 754 (S.D.N.Y. 2004). The District Court initially determined only the awards to CNN and ABC, and subsequently determined the award for CBS. These amounts were not entered as final judgments in the district court until March 8, 2005 (ABC and CNN) and March 23, 2005 (CBS). (Appendix at A12-17)

On April 19, 2004, Petitioner filed three notices of appeal to the U.S. Court of Appeals for the Second Circuit specifically noting that the notices are effective upon the entry of a final judgment in each case, pursuant to the stipulations' express language and Fed. R. App. P. 4(a)(2), *Filing Before Entry of Judgment*. (Appendix at 20-22)

The District Court issued rulings regarding the fee amounts on February 3, 2004 (CNN and ABC) and on February 19, 2004 (CBS). Despite the existence of

the endorsed stipulations of August 2003, no Defendant had filed, or moved for, the entry of a final judgment regarding its award.

On November 24, 2004, the U.S. Court of Appeals for the Second Circuit dismissed Petitioner's appeals as untimely, stating that Petitioner:

> did not file notices of appeals within thirty days after the entry of the district court's orders granting the appellees attorneys' fees. *See* Fed. R. App. P. 4(a)(1); *see also* Fed. R. Civ. P. 58 (a)(1)(C) (a separate document is not required for an order disposing of a motion for attorneys' fees). This Court may not extend the time for Appellant to file a notice of appeal. *See* Fed. R. App. P. 26(b)(1).

See Dismissal from U.S. Court of Appeals for the Second Circuit. (Appendix at A18-19)

Video-Cinema seeks a *Writ of Mandamus* against the Second Circuit so that it will abide by its Orders dated August 4 and 5, 2003, allowing Petitioner to perfect its appeals. The language of the Orders is unambiguous, expressly granting Petitioner the right to file its appeals after the entry of *final judgments* adjudicating the amounts of attorney's fees awarded (and not final orders). The final judgments were not entered until almost a year following the filing of Petitioner's notices of appeal in April 2004.

ARGUMENT

THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT CANNOT IGNORE THREE STIPULATIONS IT ENDORSED AS ORDERS. EACH UNAMBIGUOUSLY STATES THAT "THIS STIPULATION SHALL NOT PRECLUDE ANY APPEAL FROM A FINAL JUDGMENT WHICH ADJUDICATES THE PRECISE AMOUNT OF ANY ATTORNEYS' FEES AWARDED BY THE DISTRICT COURT."

The U.S. Court of Appeals for the Second Circuit cannot simply ignore its Orders. Here, the court endorsed three stipulations as Orders, each stating that "[t]his stipulation shall not preclude any appeal from a final judgment which adjudicates the precise amount of any attorneys' fees awarded by the District Court." (Appendix at A23-28)

The Circuit's Orders entered November 24, 2004, dismissing the appeals, make no mention of the court's stipulated Orders dated August 4 and 5, 2003, which grant Petitioner the right to file its appeal "from a final judgment which adjudicates the precise amount of any attorney's fees awarded by the District Court." (Appendix at A23-28)

The "Unique Circumstances" Doctrine Applies and Binds a Court to Honor its Orders

In *Moore v. South Carolina Labor Board*, 100 F.3d 162 (D.C. Cir. 1996), the United States Court of Appeals for the District of Columbia Circuit considered whether the "unique circumstances" doctrine may be invoked to excuse a party's failure to

file a timely notice of appeal, where the party missed the applicable deadline by relying on erroneous information received from the clerk's office staff. There, the court concluded that the "unique circumstances" doctrine applies only "where a party who could have filed a timely notice of appeal is lulled into missing the deadline by a formal *court order or ruling*, containing specific assurances that action which extends or postpones the deadline has properly been taken." *Moore,* 100 F.3d at 162 (emphasis added).

The Supreme Court has recognized a narrow exception, known as the "unique circumstances" doctrine, under which appellate courts will excuse an untimely notice of appeal where the appellant could have filed a timely notice but was misled to delay filing by a court order or ruling which purportedly extended or tolled the appeal deadline. *Moore,* 100 F.3d at 162. *See, e.g., Wolfsohn v. Hankin*, 376 U.S. 203 (1964); *Thompson v. INS*, 375 U.S. 384 (1964); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962).

The initial Supreme Court cases in this regard involved court rulings or orders that explicitly – although erroneously – extended the deadline for filing a notice of appeal, or the deadline for filing a post-judgment motion, which tolled the time for noting an appeal. *See Wolfsohn*, 376 U.S. at 203-04; *Thompson*, 375 U.S. at 385-87; *Harris Truck Lines, Inc.*, 371 U.S. at 216-17.

In *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989), however, the Court was called upon to decide whether a litigant was entitled to rely on a court's mere acceptance and processing of an untimely notice of appeal. In holding that the unique circumstances doctrine did not apply in that instance, the Court explained that the exception applies "only where a

party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." *Id.* at 179. *Osterneck* thus clarified that to qualify for the unique circumstances exception, the judicial action relied upon must include some affirmative assurance which, if proper, would have extended or postponed the deadline for filing the notice of appeal.

In *Moore*, however, the District of Columbia did not find a basis for applying the doctrine. Although the statements made by the clerk's office staff may have constituted specific assurances, they could not fairly be characterized as official judicial action. With the exception of one case, application of the unique circumstances exception has been limited to situations involving written court orders or oral rulings made during the course of a hearing. 100 F.3d at 164.

The District of Columbia Circuit determined that application of the unique circumstances exception has by and large been limited to formal court action, as a formal order or ruling (1) generates the highest level of justifiable reliance, and (2) raises virtually no possibility of evidentiary problems for appellate courts faced with applying the exception. *Id.*

The Second Circuit cited *Moore* in *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144 (2d Cir. 1999). In *Rezzonico*, the U.S. Court of Appeals held that for the "unique circumstances" doctrine to apply, "*'Judicial officer' means a judge or a member of a judge's staff empowered to speak in the judge's behalf.*" *Rezzonico*, 182 F.3d at 152 (emphasis added). This is clearly the case here.

Petitioner relied upon the August 4 and 5, 2003 stipulations endorsed as Orders since they were prepared and executed by the *staff counsel* of the Circuit Court who supervised and controlled their

execution. The Orders explicitly state that they do not "preclude any appeal from a *final judgment*" that determines the amount of legal fees awarded, giving Petitioner an unambiguous "specific assurance" that an appeal can be taken against a final judgment. (emphasis added.) The language of the Orders specifically refers to an appeal following "a final judgment." Petitioner should be able to rely on these Orders and have its notices of appeal considered timely filed in light of the Second Circuit's Orders specifically granting Petitioner the right to appeal final judgments (and not orders). Petitioner's appeal notice was well within the 150-day period of Fed. R. Civ. P. 58(b)(2).

Other cases involving the doctrine of unique circumstances in the Second Circuit have dealt with post-judgment motions before the district courts and whether the appeals were timely filed. *See, e.g., United States of America ex rel. McAllen v. The City of New York*, 248 F.3d 48 (2d Cir. 2001); *Lichtenberg v. Besicorp Group, Inc.*, 204 F.3d 397 (2d Cir. 2000). The facts of this case are distinguishable since it is based on an Order endorsed by staff counsel who controlled its preparation and supervised its execution. Having endorsed the stipulation as an Order, staff counsel acted in the capacity of a "judicial officer", as this phrase is used in *Osterneck*, 489 U.S. at 179. Since Petitioner relied on the Orders and actions of the Second Circuit's staff counsel, this case falls under the protection of the unique circumstances doctrine. The *Writ of Mandamus* is necessary for the Court of Appeals to abide by the language of its Orders governing the appeals.

RELIEF REQUESTED

Petitioner seeks the *Writ of Mandamus* against the U.S. Court of Appeals for the Second Circuit, which denied Petitioner's Appeal of the attorneys' fees awards despite the above-mentioned Orders permitting an appeal of such an award after a "final judgment." This relief is not available in any other court, because Video-Cinema has exhausted its appeals rights in this matter below.

Video-Cinema wishes to perfect its appeal of the attorneys' fees awards according to the Second Circuit's Orders. The U.S. Court of Appeals for the Second Circuit must abide by its mandates of August 4 and 5, 2003, and permit Video-Cinema to perfect its appeal within 30 days of this honorable Court issuing the *Writ of Mandamus*.

Petitioner has a valid basis for appealing the attorneys' fees awards, and respectfully submits that the District Court should have denied the attorneys' fees at issue because Defendants failed to comply with Fed. R. Civ. P. 54(d)(2)(B).

CONCLUSION

Based on the foregoing, Petitioner respectfully requests this honorable Court to permit Petitioner's appeal of the attorneys' fees awards. The U.S. Court of Appeals for the Second Circuit, by the "SO ORDERED" on the parties' stipulations, created the expectation that an appeal of any attorneys' fees award would occur after a final judgment. The Defendants failed to comply strictly with the Federal Rules of Civil Procedure, and the appeal of the attorneys' fees should come as no surprise.

Respectfully submitted,

Mike Meier
International Law Group, PLLC
1004 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
Phone: (202) 544-7745
Fax: (202) 544-7746
Attorney for Petitioner

Supreme Court, U.S.
FILED

041638 JUN 6 2005

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

In Re Video-Cinema Films, Inc.
Petitioner

ON PETITION FOR A WRIT OF MANDAMUS TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

Mike Meier
International Law Group, PLLC
1004 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
Phone: (202) 544-7745
Fax: (202) 544-7746
Attorney for Petitioner

APPENDIX TABLE OF CONTENTS

Dismissal of motions for Reconsideration by U.S. Court of Appeals for the Second Circuit on March 7, 2005 2
Judgment of Attorney's fees from the U.S. District Court for the Southern District of New York on March 8, 2005 12
Dismissal of the Appeal by the U.S. Court of Appeals for the Second Circuit on November 24, 2004..... 18
Notice of Appeal of Attorney's fees to the U.S. Court of Appeals for the Second Circuit on April 19, 2004 20
Party Stipulations endorsed as Orders from the U.S. Court of Appeals for the Second Circuit on August 4-5, 2003..... 23
Decision of the U.S. District Court for the Southern District of New York on February 3, 2004 in *Video-Cinema Films v. Cable News Network, Inc.*, Nos. 98 Civ.7128 (BSJ), 98 Civ.7129 (BSJ), 98 Civ.7130 (BSJ) (S.D.N.Y. February 3, 2004)..... 29

United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Video-Cinema Films, Inc.
Appellant,

v. Docket No(s). 04-3197

American Broadcasting
Companies, Inc.,
Appellee

United States Court of Appeals
Filed
March 7, 2005
Roseann B. MacKechnie, Clerk
Second Circuit

ORDER

Before Hon. Wilfred Feinberg, Hon. Pierre N. Leval, Hon. Chester J. Straub, *Circuit Judges*. IT IS HEREBY ORDERED that the motion for rehearing and rehearing *en banc* is DENIED.

FOR THE COURT:
Roseann B. Mackechnie, Clerk
By:

03/07/05 "s/Tracy W. Young"
Date Tracy W. Young,
Motion Staff Attorney

United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Roseann B. MacKechnie
Clerk

At the stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the day of May 2005.

04-3197-cv

Video Cinema Films, Inc.
Appellant,

v.

American Broadcasting Companies, Inc.
Appellee.

A Motion for Reconsideration and Reconsideration En Banc having been filed herein by the appellant Video-Cinema Films, Inc. Upon consideration by the panel that decided the appeal, is Ordered that said motion for reconsideration is DENIED.

It is further noted that the motion for reconsideration en banc has been transmitted to the judges for the court in regular service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By:

"s/Tracy W. Young"

Motion Staff Attorney

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse at Foley Square
40 Centre Street, New York, NY 1007
Telephone: 212-857-8500

Motion Information Statement

Caption[use short title]
Video-Cinema Films, Inc.,

Plaintiff/Appellant,
against –

CNN, Inc.

Defendant.Appellee.

Docket Number(s): 04-3196
Motion for: Rehearing of November 24, 2004
Order by panel or en banc.

Set forth below precise, complete statement
Of relief sought:
Reverse and vacate Order of November

24, 2004 dismissing the plaintiff's notice of appeal

Moving party: Appellant
Plaintiff
Appellant/Petitioner

Moving attorney: Gregory A. Sioris

350 Fifth Avenue, Suite 7606

New York, NY 10118-7606

(212) 840-2644

gasioris@prodigy.net

Opposing party:

Opposing attorney: Gregory A. Welch

Davis Wright Termaine

1633 Broadway

New York, NY 10019

gregwelch@dwt.com

Court-Judge/Agency appealed from: U.S.D.C., S.D.N.Y., Jones, J.

Please check appropriate boxes:

Has consent of opposing counsel:
been sought? - No
been obtained? – No

Is oral argument requested? – No

Has argument date of appeal been set? (blank)

For emergency motions, motions for stays and injunctions pending appeal:

Has this relief been made below? (blank)

Has this relief been previously sought in this Court? (blank)

Requested return date and explanation of emergency:

_____

_____

Signature of Moving Attorney

"s/Gregory A. Sioris"

Date: January 19, 2004

Has service been effected? – Yes

ORDER

Before: Hon. Wilfred Feinberg, Hon. Pierre N. Leval, Hon. Chester J. Straub,
Circuit Judges

IT IS HEREBY ORDERED that the motion for rehearing and rehearing *en banc* is DENIED.

March 7, 2005
Date

United States Court of Appeals
Roseann B. MacKechnie,
March 7, 2005

Roseann B. MacKechnie, Clerk
Second Circuit

For the Court:
Roseann B. MacKechnie, Clerk
By:
"s/Tracy W. Young"
Tracy W. Young
Motions Staff Attorney
DISMISSAL OF MOTION FOR RECONSIDERATION

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse at Foley Square
40 Centre Street, New York, NY 1007
Telephone: 212-857-8500

Motion Information Statement

Caption[use short title]
Video-Cinema Films, Inc.,

Plaintiff/Appellant,
against –

CBS Corp., Inc.

Defendant.Appellee.

Docket Number(s): 04-3199
Motion for: Rehearing of November 24, 2004
Order by panel or en banc.

Set forth below precise, complete statement
Of relief sought:
Reverse and vacate Order of November

24, 2004 dismissing the plaintiff's notice of appeal

Moving party: Appellant
Plaintiff
Appellant/Petitioner

Moving attorney: Gregory A. Sioris

350 Fifth Avenue, Suit 7606

New York, NY 10118-7606

(212) 840-2644

gasioris@prodigy.net

Opposing party:

Opposing attorney: Naomi B. Waltman

Viacom Law Department

1515 Broadway, 51st Floor

New York, NY 10036

Naomi.waltman@viacom.com

Court-Judge/Agency appealed from: U.S.D.C., S.D.N.Y., Jones, J.

Please check appropriate boxes:

Has consent of opposing counsel:

been sought? - No
been obtained? – No

Is oral argument requested? – No

Has argument date of appeal been set? (blank)

For emergency motions, motions for stays and injunctions pending appeal:

Has this relief been made below? (blank)

Has this relief been previously sought in this Court? (blank)

Requested return date and explanation of emergency:

_____

_____

Signature of Moving Attorney

"s/Gregory A. Sioris"

Date: January 19, 2004

Has service been effected? – Yes

ORDER

Before: Hon. Wilfred Feinberg, Hon. Pierre N. Leval, Hon. Chester J. Straub,
Circuit Judges

IT IS HEREBY ORDERED that the motion for rehearing and rehearing *en banc* is DENIED.

March 7, 2005
Date

United States Court of Appeals
Roseann B. MacKechnie,
March 7, 2005
Roseann B. MacKechnie, Clerk
Second Circuit

For the Court:
Roseann B. MacKechnie, Clerk
By:
"s/Tracy W. Young"
Tracy W. Young
Motions Staff Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VIDEO-CINEMA FILMS, INC., Plaintiff — 98 Civ. 7128

-against- — JUDGMENT

CABLE NEWS NETWORK, INC., (d/b/a CNN) Defendant.

Defendant Cable News Network, Inc. ("CNN") having moved by Notice of Motion dated April 17, 2001, for summary judgment pursuant to Federal Rule of Civil Procedure 56, and the matter having come before the Honorable Barbara S. Jones, United States District Judge, and the Court by Amended Opinion and Order dated September 28, 2001, having granted defendant's motion and having directed the entry of judgment for defendant and the judgment having been duly entered, and CNN having moved by Notice of Motion dated ****September 17, 2001,**** for costs and attorneys' fees pursuant to 17 U.S.C. § 505, and the matter having come before Honorable Barbara S. Jones, United States District Judge, and the Court by Opinion and Order February 3, 2004, having granted defendant's motion and having directed plaintiff, Video-Cinema Films, Inc. to pay to CNN $140,495.69 in attorney's fees and $21,849 in costs,

Now, on the motion of Reiss, Eisenpress & Eisenberg, LLP, attorneys for defendant CNN, it is

Ordered, Ajudged and DECREED: that for the reasons stated in the Court's Opinion and Order dated February 3, 2005, the defendant, Cable News

**** ***Nota Bene*** *– The actual date for this was May 23, 2003*

Network, Inc. with headquarters at 1 CNN Center, Atlanta Georgia 30303, recover from plaintiff, Video Cinema Films, Inc. with its principal place of business at 510 East 86th Street,

New York, New York 10028, the sum of $140,495.69, plus costs and disbursements totaling $21,849 as taxed, for a total of $162,344.69, plus post-judgment interest from the date of entry of judgment pursuant to 28 U.S.C. § 1961, and that defendant CNN shall have execution therefore.

Judgment signed and entered this 8th day of March, 2005.

"s/ Barbara S. Jones"

THIS DOCUMENT WAS ENTERED
ON 3/8/05

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VIDEO-CINEMA FILMS, INC., 98 Civ. 7129
Plaintiff

-against- JUDGMENT

AMERICAN BROADCASTING COMPANIES., INC

Defendant.

Defendant American Broadcasting Companies, Inc. ("ABC") having moved by Notice of Motion dated April 17, 2001, for summary judgment pursuant to Federal Rule of Civil Procedure 56, and the matter having come before the Honorable Barbara S. Jones, United States District Judge, and the Court by Amended Opinion and Order dated September 28, 2001, having granted defendant's motion and having directed the entry of judgment for defendant and the judgment having been duly entered, and ABC having moved by Notice of Motion dated ****** September 17, 2001******, for costs and attorneys' fees pursuant to 17 U.S.C. § 505, and the matter having come before Honorable Barbara S. Jones, United States District Judge, and the Court by Opinion and Order February 3, 2004, having granted defendant's motion and having directed plaintiff, Video-Cinema Films, Inc. to pay to CNN $140,495.69 in attorney's fees and $21,849 in costs,

Now, on the motion of Reiss, Eisenpress & Eisenberg, LLP, attorneys for defendant CNN, it is

Ordered, Ajudged and DECREED: that for the reasons stated in the Court's Opinion and Order dated

*******Nota Bene*** *– The actual date for this was May 23, 2003*

February 3, 2005, the defendant, American Broadcasting Companies, Inc., with headquarters at 77 West 66th Street, New York, New York 10023, recover from plaintiff, Video-Cinema Films, Inc. with its principal place of business at 510 East 86th Street, New York, New York 10028, the sum of $78,641.85, plus costs and disbursements totaling $7,001.97 as taxed, for a total of $85,643.82, plus post-judgment interest from the date of entry of judgment pursuant to 28 U.S.C. §1961, and that defendant ABC shall have execution therefore

Judgment signed and entered this 8th day of March, 2005.

"s/ Barbara S. Jones"

THIS DOCUMENT WAS ENTERED
ON 3/8/05

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VIDEO-CINEMA FILMS, INC., Plaintiff

-against-

CBS CORPORATION, Defendant.

98 Civ. 7130

JUDGMENT

Defendant CBS Corporation, Inc. ("CBS") having moved by Notice of Motion dated April 17, 2001, for summary judgment pursuant to Federal Rule of Civil Procedure 56, and the matter having come before the Honorable Barbara S. Jones, United States District Judge, and the Court by Amended Opinion and Order dated September 28, 2001, having granted defendant's motion and having directed the entry of judgment for defendant and the judgment having been duly entered, and CNN having moved by Notice of Motion dated ****September 17, 2001,**** for costs and attorneys' fees pursuant to 17 U.S.C. § 505, and the matter having come before Honorable Barbara S. Jones, United States District Judge, and the Court by Opinion and Order February 3, 2004, having granted defendant's motion and having directed plaintiff, Video-Cinema Films, Inc. to pay to CBS $140,495.69 in attorney's fees and $21,849 in costs,

Now, on the motion of Reiss, Eisenpress & Eisenberg, LLP, attorneys for defendant CBS, it is

Ordered, Ajudged and DECREED: that for the reasons stated in the Court's Opinion and Order dated February 3, and 19 2005, the defendant, CBS

**** ***Nota Bene*** – *The actual date for this was May 23, 2003*

Corporation, with headquarters at 1515 Broadway New York,

New York 10036-5794, recover from plaintiff, Video-Cinema Films, Inc. with its principal place of business at 510 East 86th Street, New York, New York 10028, the sum of $48,864.80, plus costs and disbursements totaling $3,436.78 as taxed, for a total of $52, 301.58, plus post judgment interest from the date of entry of judgment pursuant to 28 U.S.C. § 1961, and that defendant CBS shave have execution therefore..

Judgment signed and entered this 8th day of March, 2005.

"s/ Barbara S. Jones"

THIS DOCUMENT WAS ENTERED ON 3/23/05

Dismissal of Appeal by
U.S. Court of Appeals for the Second Circuit.
Filed November 24, 2004

S.D.N.Y.
98-cv-7128
98-cv-7129
98-cv-7130
Jones. J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 24th day of November two thousand and four,

Present:
United States Court of Appeals
Hon. Wilfred Feinberg, Filed
Hon. Pierre N. Leval, November 24 2004
Hon. Chester J. Straub,

Circuit Judges

Video-Cinema Films, Inc.,

Plaintiff-Appellant
04-3196-cv

v.

Cable News Networks, Inc.,

Defendant-Appellee.

Video-Cinema Films, Inc.,

Plaintiff-Appellant,
04-3197-cv

v.

American Broadcasting Companies, Inc.,

Defendant-Appellee.

Video-Cinema Films, Inc.,

Plaintiff-Appellant,
04-3197-cv

v.

CBS Corporation.,

Defendant-Appellee.

Appellees move to dismiss the appeals, docketed under 04-3196-cv, 04-3197-cv, and 04-3199-cv, consolidated that the motions are GRANTED and the appeals are DISMISSED because Appellant did not file notices of appeals within thirty days after the entry of the district court's orders granting the appellees attorney's fees. See Fed. R. App. 4(a)(1); see also Fed. R. Civ. P. 58(a)(1)(C) (a separate document is not required for an order disposing of a motion for attorneys' fees). The Court may not extend the time for Appellant to file a notice of appeal. See Fed. R. App. P. 26(b)(1).

It is further ORDERED that Appellant's cross-motion for extension of time to file is DISMISSED as moot.

For the Court:
Roseann B. MacKechnie, Clerk

By: "s/Olivia M. George"
Olivia M. George
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VIDEO-CINEMA FILMS, INC., 98 Civ. 7130
Plaintiff

-against- **Notice of Appeal**

CBS CORPORATION,
Defendant. DOC #21

Notice is hereby given that plaintiff Video-Cinema Films, Inc., hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment in the above captioned suit, as and of the date of its entry in this Court.

Filed U.S. District Court
April 19, 2004
S.D.N.Y.

Dated: New York, NY
April 16, 2004

"s/ Gregory A. Sioris"
Attorney for the Plaintiff
350 Fifth Avenue, Suite 7606
New York, NY 10118-7606
(212) 840-2644

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VIDEO-CINEMA FILMS, INC., Plaintiff

-against-

CABLE NEWS NETWORK, INC, d/b/a CNN, Defendant.

98 Civ. 7128

Notice of Appeal

DOC #77

Notice is hereby given that plaintiff Video-Cinema Films, Inc., hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment in the above captioned suit, as and of the date of its entry in this Court.

Filed U.S. District Court
April 19, 2004
S.D.N.Y.

Dated: New York, NY
April 16, 2004

"s/ Gregory A. Sioris"
Attorney for the Plaintiff
350 Fifth Avenue, Suite 7606
New York, NY 10118-7606
(212) 840-2644

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VIDEO-CINEMA FILMS, INC., 98 Civ. 7129
Plaintiff

-against- **Notice of Appeal**

AMERICAN BROADCASTING COMPANIES, INC
Defendant.

DOC #24

Notice is hereby given that plaintiff Video-Cinema Films, Inc., hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment in the above captioned suit, as and of the date of its entry in this Court.

Filed U.S. District Court
April 19, 2004
S.D.N.Y.

Dated: New York, NY
April 16, 2004

"s/ Gregory A. Sioris"
Attorney for the Plaintiff
350 Fifth Avenue, Suite 7606
New York, NY 10118-7606
(212) 840-2644

MANDATE

FILED
AUG- 4 2003
Roseann B. MacKechnie, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Video Cinema Films
v.
ABC

Docket No. 03-7502

Stipulation Withdrawing Premature Appeal

It Appearing that the above appeal is premature because some claims are still pending in District Court, i.e., the amounts of attorneys' fees awarded have not been determined, FRCP 54(b), and no certification has been granted, WHEREFORE,

The undersigned counsel for the parties hereby stipulate that the above-captioned appeal is hereby withdrawn without costs and without attorney's fees pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure. This stipulation shall not preclude any appeal from a final judgment, which adjudicates the precise amount of any attorneys' fees awarded by the District Court

"s/ Gregory A. Sioris"
Attorney for Appellant

"s/ Nathan Siegel"
Attorney for Appellee

So Ordered:

For the Court
Roseann B. MacKechnie, Clerk of the Court

"S/ Stanley A. Bass"
Stanley A. Bass, Staff Counsel
Aug. 4, 2003
Certified 8/5/03

MANDATE
AUG- 4 2003

FILED

Roseann B. MacKechnie, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Video Cinema Films
v. Docket No. 03-7488
C.N.N.

Stipulation Withdrawing Premature Appeal

It Appearing that the above appeal is premature because some claims are still pending in District Court, i.e., the amounts of attorneys' fees awarded have not been determined, FRCP 54(b), and no certification has been granted, WHEREFORE,

The undersigned counsel for the parties hereby stipulate that the above-captioned appeal is hereby withdrawn without costs and without attorney's fees pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure. This stipulation shall not preclude any appeal from a final judgment, which adjudicates the precise amount of any attorneys' fees awarded by the District Court

"s/Gregory A. Sioris"
Attorney for Appellant

"s/Robert D. Balis"
Attorney for Appellee

Dated: AUG 04 2003

So Ordered:

For the Court Copy
Roseann B. MacKechnie, Clerk of the Court
By

"s/ Stanley A. Bass"

Stanley A. Bass, Staff Counsel
Aug. 4, 2003

MANDATE

FILED
AUG- 5 2003
Roseann B. MacKechnie, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Video Cinema Films
v. Docket No. 03-7504
CBS

Stipulation Withdrawing Premature Appeal

It Appearing that the above appeal is premature because some claims are still pending in District Court, i.e., the amounts of attorneys' fees awarded have not been determined, FRCP 54(b), and no certification has been granted, WHEREFORE,

The undersigned counsel for the parties hereby stipulate that the above-captioned appeal is hereby withdrawn without costs and without attorney's fees pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure. This stipulation shall not preclude any appeal from a final judgment, which adjudicates the precise amount of any attorneys' fees awarded by the District Court

"s/Gregory A. Sioris"
Attorney for Appellant

"s/ Naomi B. Waltman"
Attorney for Appellee
"s/ Naomi B. Waltman"
Viacom Law Department

Dated: AUG 4 2003

So Ordered:

For the Court
Roseann B. MacKechnie, Clerk of the Court
By

"s/ Stanley A. Bass"
Stanley A. Bass, Staff Counsel
Aug. 4, 2003

United States District Court,
S.D. New York.
VIDEO-CINEMA FILMS, INC., Plaintiff,
v.
CABLE NEWS NETWORK, INC. d/b/a CNN, Defendant.
VIDEO-CINEMA FILMS, INC., Plaintiff,
v.
AMERICAN BROADCASTING COMPANIES, INC.,
Defendant.
VIDEO-CINEMA FILMS, INC., Plaintiff,
v.
CBS CORPORATION, Defendant.
Nos. 98 Civ.7128 BSJ, 98 Civ.7129 BSJ, 98 Civ.7130 BSJ.
Feb. 3, 2004.

JONES, J.

Plaintiff Video-Cinema Films, Inc. ("Video-Cinema") sued Defendants Cable News Network, Inc. LLP, LLLP, d/b/a CNN ("CNN"), American Broadcast Network ("ABC") and CBS Broadcasting Inc. ("CBS"), claiming that the Defendants infringed Plaintiff's copyright, pursuant to 17 U.S.C. § 101, and unfairly competed with Plaintiff when they broadcasted nationally excerpted footage from the motion picture *"The Story of G.I. Joe"* after the death of actor Robert Mitchum, who had appeared in that film. The Court granted summary judgment to the Defendants on September 18, 2001. *Video-Cinema Films, Inc. v. Cable News Network, Inc.*, 2001 WL 1154625 (S.D.N.Y. Sept.18, 2003), *as amended*, 2001 WL 1518264 (S.D.N.Y. Nov 28, 2001).

Following this decision, Defendants submitted an application for legal fees jointly "to conserve judicial resources," and to avoid unnecessary and duplicative work and costs. *Video-Cinema Films, Inc. v. Cable News Network, Inc.*, 2003 WL 1701904, *1 (S.D.N.Y. Mar.31, 2003). The Court ruled in favor of the Defendants on March 31, 2003 ("Fee Decision"). *Id.* In reaching its decision to award fees and costs to Defendants, this Court noted that "[t]hroughout the underlying litigation, Plaintiff made objectively unreasonable factual and legal arguments." *Id.* at *2 (citing several arguments that the Court found to be without merit). Presently before the Court are the motions to determine the exact amount of attorneys' fees and costs Plaintiff will pay to Defendants pursuant to the Fee Decision. *See id.*

DISCUSSION

Section 505 of the Copyright Act provides that:

[i]n any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 505.

In determining what constitutes a reasonable fee award under Section 505, courts in this circuit frequently apply the "lodestar" method. *See Crescent Pub'g Group, Inc. v. Playboy Enters., Inc.*, 246 F.3d 142, 146, 150 (2d Cir.2001); *see generally Yurman Designs, Inc. v. PAJ, Inc.*, 125 F.Supp.2d 54 (S.D.N.Y.2000). Under this method, "fees are determined by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate." *Earth Flag Ltd. v. Alamo Flag Co.*, 154 F.Supp.2d 663, 668-69 (S.D.N.Y.2001) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)); *see also Savoie v. Merchants Bank*, 166 F.3d 456, 460 (2d Cir.1999).

Rates are deemed reasonable when they are "commensurate with the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Yurman Designs*, 125 F.Supp.2d at 58; *see also Crescent Publ'g Group*, 246 F.3d at 150-51. Some courts have considered various publication surveys of billing rates, such as the National Law Journal's annual survey of rates charged by the nation's 250 largest law firms and the billing rate surveys conducted by the American Intellectual Property Law Association ("AIPLA"). *See, e.g., Yurman Designs*, 125 F.Supp.2d at 55-58; *Celebrity Serv. Int'l, Inc. v. Celebrity World, Inc.*, 9 U.S.P.Q.2d 1673, 1687 (S.D.N.Y.1988). Courts also may consider the billing rates approved in comparable cases, *see, e.g., Luciano v. Olsten Corp.*, 109 F.3d 111, 115-16 (2d Cir.1997); *New York State Nat'l Org. for Women v. Pataki*, 2003 WL 2006608, *2 (S.D.N.Y. Apr.30, 2003), and may also rely on their own knowledge of current market rates for attorneys of similar skill and experience. *See Screenlife Establishment v. Tower Video, Inc.*, 868 F.Supp. 47, 53 (S.D.N.Y.1994).

Fee awards should also reflect the skill of the attorneys and the results achieved. *Earth Flag Ltd.*, 154 F.Supp.2d at 669. With respect to the "results achieved" aspect, courts have repeatedly stressed that success is to be measured by whether important copyright policies, such as the fair use doctrine, have been advanced by the party's actions, not by mere financial gain or by the amount at issue. *See Crescent Publ'g Group*, 246 F.3d at 150 ("Because copyright actions may not always result in high damage awards, for instance if the commercial value of the work is minimal ... an objective measure such as the lodestar seems the most effective method in enabling parties to retain competent counsel.").
The Court finds that the hours claimed by all the Defendants

are reasonable, especially in light of the protracted nature of the litigation and the objectively unreasonable arguments made by the Plaintiff, but modifies each Defendant's requested reward, as explained more fully herein. [FN1] *Cf. id.*, 246 F.3d at 147, 150.

> FN1. Plaintiff challenges all three Defendants' requests for attorneys' fees on the grounds that they are untimely under Local Rule 54.1. However, Defendants seek reimbursement pursuant to the Copyright Act, Section 505, and therefore the constraints of the local rule are inapplicable.

1. *CNN*

CNN, through its counsel Davis Wright Tremaine LLP ("DWT"), seeks the award of attorney's fees and costs in the amount of $282,855 ($236,439 in fees and $21,045 in costs for all legal work performed in the underlying action, and $24,567 in fees and $804 in costs for all legal work performed in the fee proceedings).

a. *DWT's Billing Rates*

One partner, two associates, and several paralegals at DTW, a national law firm of more than 300 attorneys, worked on this litigation out of DWT's New York office since the case's inception in October 1998 through the summary judgment decision in October 2001. (Balin Decl. at 10-11). DWT has a sizable media law and intellectual property department and represents numerous high-profile clients in copyright, amongst other types, of litigations. (*Id.* at 11, Ex.

11). The specific attorneys who worked on this matter are very well-educated, well-credentialed and experienced in IP litigation. (*Id.* at 11-14; Exs. 12-14).
From October 1998 until June 1999, DWT charged CNN on all the matters it handled for CNN [FN2] the standard billing rates of the partners, associates and paralegals working at the firm. (*Id.* at 14) From June 1999 through December 1999, under a "sliding scale volume" arrangement, the rates billed were discounted by 5%, then 8%, then up to 10% from the standard rates. (*Id.*). Thereafter, a new arrangement took affect, whereby DWT's standard fees were flatly discounted by 10%, from January 2000 through mid-2001, and then modified only for partner's billing to a 13% discount through December 2002. (*Id.* 14-15).

> FN2. As will be discussed further in section (d), *infra,* DWT did not bill CNN at these rates for a portion of the litigation.

For instance, [FN3] in 2000, the per hour rates were as follows: the partner's standard rate was $295 and billed rate to CNN was $265; the two associates' standard rates were $240 and $200, and billed rate to CNN was $216 and $180 respectively; the paralegals' standard billing rate was $120 and billed rate to CNN was $108. (*Id.* at 15; Ex. 6).

> FN3. For brevity's sake, the Court will not include all of the standard and discount rates throughout the 4-year period for each attorney and paralegal who worked on this case.

The Court finds that DWT's billing rates are reasonable for several reasons. First, these rates are commensurate with the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. *Cf. Yurman Designs,* 125 F.Supp.2d at 58. Accordingly to the AIPLA surveys, DWT's billing rates are below the median rates charged by other New York law firms

of similar size and copyright litigation experience. (*See* Balin Decl. Exs. 15-17). For example, in 2000, the median billing for New York City intellectual property law firms were $370 per hour for partners and $250 per hour for associates, which is at or above DWT attorneys' rates. (*See id.* Ex. 16; *see also* Ex. 18 (showing that 80% of New York law firms paralegals rates ranged from $105 to $150)).

Second, DWT's billing rates are also below the rates awarded New York counsel in similar intellectual property litigations. *Cf.* *Yurman Designs,* 125 F.Supp.2d at 55-58 (approving and awarding average billing rates of $520 for partners, $278 for associates, and $162 for paralegals for the year 1999); *Yamanouchi Pharmaceutical Co. v. Danbury Pharmacal, Inc.*, 51 F.Supp.2d 302, 305 (S.D.N.Y.1999) (finding 1998 partner billing rates of $350 and $390 "ball-park reasonable"). Third, the Court, from its own knowledge of prevailing billing rates, finds DWT's rates to be reasonable. [FN4]

> FN4. The Court does not agree with Plaintiff's assertion that CNN must proffer expert testimony regarding the reasonableness of the fees. (Pl's Mem. at 3). First, Plaintiff offers no authority in support of this argument. Second, DWT has supplied the Court with more than adequate records to support this Court's finding that the fees are reasonable.
>
> As plaintiff makes the same argument as to each of the Defendants, the Court rejects it, as to each Defendant, for the same reasons.

Therefore, the Court finds that the rates billed by DWT's attorneys and paralegals are reasonable.

b. *Time Spent by DWT*

DWT invoiced 1,057 hours of work for all of its employees involved in this litigation. The Court finds this amount of time is reasonable for this protracted litigation that spanned three years and included motions, depositions, and discovery requests and disputes. *See* Ballin Dec. at 25-40. DWT's time was also undoubtedly multiplied by Plaintiff's numerous unreasonable claims and arguments. *See Video-Cinema Films*, 2003 WL 1701904, at *2-5. Moreover, it is clear from the records supplied by DWT that, in addition to its discounted rates, it also wrote off more than 72 hours of work. [FN5] (Ballin Dec. Exs. 4-6). Accordingly, the Court finds that the number of hours invoiced by DWT reasonable.

> FN5. Instead of looking upon these write-offs favorably, Plaintiff's expert asserts that the Court should not trust any of the time records produced by DWT because there is no assurance that "all of the time charges were thoroughly reviewed for reasonableness and accuracy." (Report of Philip Seltzer ("Seltzer's CNN Rep.") at 8). The Court, however, finds no reasonable basis to question the validity and accuracy of these reports,
>
> which were submitted with a sworn affidavit of an attorney.

Plaintiff does not directly challenge the reasonableness of total hours DWT billed, but argues that Plaintiff should not have to pay for the hours spent in internal conferences at DWT, and conferences and communications between DWT

and the other Defendants. (Seltzer's CNN Rep. at 4, 8). Plaintiff offers no legal authority for this contention, and the Court finds that time spent strategizing, both internally and with other parties who are litigating the same claims, is legitimate so long as the time is not excessive. Here, the time spent was not excessive, and the Court therefore finds that these hours are compensable.

Plaintiff also argues that DWT's computer records are not contemporaneous time records of the legal work performed and that they should therefore be disregarded. The Court does not agree.

In order to evaluate the exact compensation to order, a court should examine contemporary time records that "specify, for each attorney, the date, the hours expended, and the nature of the work done." *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1148 (2d Cir.1983). Original time sheets, however, are not required; computer print-outs of the pertinent entries, when accompanied with an affidavit, are sufficient. *See Tri-Star Pictures v. Unger*, 42 F.Supp.2d 296, 302-03 (S.D.N.Y.1999).

In this case, it is clear that the records submitted by DWT qualify as contemporaneous time records. DWT provided the Court with extensive records of its time entries (Ballin Dec. Exs. 4-5) and its invoices (Ex. 6). The records show the date on which the services were performed, the hours spent and the nature of the activity performed. *Cf. New York State Ass'n for Retarded Children*, 711 F.2d at 1147-48. Video-Cinema's argument that such documentation is inadequate is both unsupported and directly contrary to prevailing law. *See also Auscape v. National Geographic Society*, 2003 WL 21976400, *3 (S.D.N.Y. Aug.19, 2003) ("[Counsel] has submitted a printout from what appears to be

its counsels' billing software which contains all the required information. Such a submission clearly meets the evidentiary threshold for the recovery of attorneys' fees.").
Therefore, the Court finds the hours, as evidenced by the records produced with DWT's fee application, reasonable.

c. *Results Achieved*

With respect to the final lodestar factor, the results achieved, it is clear to the Court that DWT, and indeed, all of the Defendants, [FN6] achieved significant success for several reasons. First, Plaintiff's claims against CNN were dismissed on summary judgment. Second, this litigation advanced the important copyright policy of "fair use," and serves as precedent protecting similarly-situated news organizations from future infringement claims arising from their practice of making reasonable use of short film excerpts in news stories.

> FN6. Because the analysis of this factor is the same for all the Defendants in this case, the Court will not address this factor again in this opinion.

d. *The Billing Agreement*

Even though the Court finds DWT's hourly rates reasonable, it declines to award the full amount of fees that DWT requests because CNN did not pay this amount. CNN entered into a billing agreement in September 1999, approximately one year after the litigation began. As of that time, CNN had already been billed $95,928.69 in fees alone. The agreement capped DWT's fees going forward, through summary judgment, at $20,000. CNN argues that this agreement should not be controlling and that the Court should award it the "reasonable" fees it was charging CNN on the

other matters it was handling for them.

In *Crescent Publishing Group, Inc. v. Playboy Enterprises, Inc.*, the Second Circuit stated that although the "lodestar method suggests that the prevailing rate in the community should trump any agreement for a lower rate made between the client and its private counsel," a court should also be careful not to award a fee that could be considered a "penalty." *Crescent Publ'g Group*, 246 F.3d at 150-51. Similarly, the Court indicated that although "[i]n some instances, the actual billing arrangement may not be reasonable," courts should nonetheless be mindful that "the billing arrangement is a significant ... factor in determining what fee is 'reasonable.' " *Id.* at 151. Most importantly, the Court warned that a fee award should not amount to a windfall for the prevailing party. *See id.*

The Court finds that awarding more than CNN paid pursuant to the fee agreement here would amount to a windfall for CNN and a penalty against Plaintiff. The cases cited by CNN, which mostly deal with fee awards in Section 1988 cases, are inapposite. Although courts allow fee awards in Section 1988 cases that exceed a fee agreement, there is one significant difference between the statutes at issue: Fees awarded pursuant to Section 1988 go directly to the attorneys, whereas under the Copyright Act, they are awarded to the prevailing party. *See id.* ([Section 505 of the Copyright Act] clearly provides for a fee award to be made to a prevailing party, not directly to counsel."). The policy concerns that weigh in favor of awarding fees to attorneys who take Section 1988 cases--i.e., providing an incentive to these attorneys by paying them at the prevailing rate rather than the rate that their clients can afford to pay--are absent here.

Accordingly, the Court awards CNN $95,928.69 in attorneys' fees incurred prior to the fee agreement and $20,000 incurred pursuant to the fee agreement, for a total of $115,928.69.

e. *Costs Incurred in the Underlying Litigation*

CNN requests an award for $21,045 in costs for the underlying litigation. CNN has provided records showing how these costs were incurred, including electronic research and document duplication, as well as DWT's bills to CNN reflecting these costs. The Court has reviewed these costs, which Plaintiff does not contest, and finds that they are reasonable. Therefore, CNN is awarded costs for the underlying litigation in the amount of $21,045.

f. *Reimbursement for Fees and Costs for Fee Application*

DWT also requests $24,567 in fees and $804 in costs for legal services performed in the protracted fee proceedings, all of which occurred after CNN's fee agreement with DWT lapsed. The Court finds that this is reasonable and directs Plaintiff to reimburse CNN in these amounts. The attorney's fees were calculated by multiplying the hourly rates that the Court has found reasonable in the previous section by 82.7 billable hours, which the Court likewise finds reasonable. CNN's counsel incurred substantial fees and costs countering, as they had in the underlying proceedings, Plaintiff's meritless arguments, including that Defendants could not file a fee motion because the "cases had closed" and that Defendants' attorneys "falsely dat[ed]" the moving papers in an "attempt to cover up their misdeeds." (*See* Ballin Dec. Ex. 78; *see also id*. at 45-50, Exs. 74, 76); *Video-Cinemas*, 2001 WL 1154625, at *2 (stating that Video-Cinema's claim "is an example of the frivolous nature of Plaintiff's arguments"). In addition, DWT

wrote off $14,726.09 in attorneys' fees and $2,105.86 in costs incurred on CNN's opposition to Plaintiff's untimely Notice of Appeal alone, which Plaintiff agreed to dismiss after meeting with Second Circuit staff counsel. (Ballin Dec. Ex. 8).

Moreover, as before, DWT wrote off many hours of work spent on the fee proceedings, including time spent drafting the Motion for Pre-Judgment Restraint of Video-Cinema, which became moot after its submission, as well as certain time spent after April 30, 2003 on drafting the extensive and lengthy Ballin Declaration that accompanied DWT's application for fees and costs.

Accordingly, the Court awards CNN $162,344.69, which consists of attorneys' fees in the amount of $115,928.69 and costs in the amount of $21,045 for the underlying litigation, and $24,567 in attorneys' fees and $804 in costs for the fee proceeding. [FN7]

> FN7. The Court declines to address the unsupported and meritless contention made by Plaintiff's "expert," Philip Seltzer, that CNN must produce its tax returns in order to verify that it actually paid DWT's fees and costs. (Seltzer's CNN Rep. at 3-4).

2. *ABC*

ABC requests a total of $127,093 in attorneys' fees and $7,001.97 in costs for all of the legal work performed throughout the course of this action. Unlike CNN, however, ABC used its in-house counsel for this matter rather than retaining outside counsel.

It is well-settled that attorneys' fees and costs should be awarded for litigation performed by in-house counsel if such fees would be awarded for the same work performed by outside counsel. *Blum v. Stenson,* 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984); *see also Broadcast Music v. R Bar,* 919 F.Supp. 656 (S.D.N.Y.1996). Courts usually determine an appropriate fee for in-house counsel's services based on what the appropriate fee would be for work performed by "independent counsel for similar services." *Broadcast Music,* 919 F.Supp. at 661. Therefore, when applying the lodestar calculation, the court may use a reasonable hourly rate that the in-house counsel would be awarded if he or she was acting in the capacity of an outside counsel. *See Blum* 465 U.S. at 900.

a. *Billing Rates*

The two attorneys at ABC who worked on this case were well-qualified and experienced in media law, and would be the equivalent of partners if they worked at a law firm. Because they were in-house, however, they performed the functions that would typically be performed by a combination of senior and junior associate as well. Accordingly, ABC suggests that the Court use a "blended" rate based on the current market rates that DWT bills out the two principal attorneys who worked on the case, and subtracting the same 12% discount, as a reasonable means of determining a lodestar rate for ABC. This rate comes out to $322 per hour. Although the Court agrees that ABC's calculation is a reasonable means of arriving at a billing rate, in this case it would amount to a windfall for ABC. ABC provided the Court with its "Estimation of the Actual Imputed Costs of In-House Counsel's Time," in which it calculates that the attorneys' time is actually worth $152.44 per hour. (ABC's Stat. Ex. 8). Plaintiff asserts, and the Court agrees, that this figure should

be used in the lodestar calculation. Because the court must be careful not to award fees that could be construed as a "penalty" or a "windfall," the Court will use the $152.44 figure in the lodestar calculation for the attorneys. *Cf.* Crescent Publ'g, 246 F.3d at 150-51.

ABC asserts that the paralegals' time was worth $108 per hour. Plaintiff does not challenge this figure, and the Court finds that it is reasonable. Therefore, the Court will use $108 in the lodestar calculation of the paralegals' fees.

b. *Hours Billed*

ABC requests reimbursement for 236.3 hours of attorney time and 9 .3 hours of paralegal time.

Similar to its challenge to CNN, Plaintiff does not contest the reasonableness of the hours purportedly expended by ABC, but instead asserts that the records produced by ABC verifying the amount were not "contemporaneous." (Pl's ABC Mem., July 31, 2003, at 2). Specifically, Plaintiff argues that ABC's former attorney, Stephanie Abrutyn, "maintained sporadic time records," and "did not submit an affidavit ... as regards whether her alleged time records were recorded contemporaneously, with any references to them being unreliable since they are based on hearsay." (*Id.* at 2). Plaintiff's expert, Philip Seltzer, challenges Abrutyn's successor attorney, Nathan Seigel, on the same basis. [FN8] (Report of Philip Seltzer ("Seltzer's ABC Rep.") at 2).

> FN8. Seltzer also asserts that because "ABC was not in the practice of keeping time records, the partial records claimed to have been kept

> can not [*sic*] be take at face value." (Seltzer's ABC Rep. at 4). This argument makes little sense, and the Court declines to find that ABC falsified the records it submitted with a sworn affirmation of counsel merely because it did not keep records at all times.

Plaintiff's first contention is, in part, plainly false, as Abrutyn supplied a sworn affidavit attached to ABC's original Statement as an Exhibit. (*See* ABC's Statement of its Reasonable Attorneys' Fees and Costs ("ABC's Stat.") Ex. B2). Moreover, ABC produced some contemporaneous records kept by its in-house attorneys, as well as other contemporaneous records, including DWT's records reflecting time its attorneys spent with ABC's attorneys and Court records, that evidence time spent and tasks worked on by ABC's attorneys. (*Id.* Exs. 2-3). The Court has reviewed these records, and concludes that they provide sufficient evidence of the 263.3 hours ABC claims it's attorneys expended and the 9.3 hours expended by the paralegals. [FN9]

> FN9. Notably, Plaintiff does not challenge this figure as unreasonable. Plaintiff merely finds fault with ABC for not submitting an expert affidavit "to support its contention of what the reasonable value of the alleged time worked is." (*Id.* at 3). This is not necessary and therefore, it does not affect the Court's analysis.

In addition to this, ABC asserts that it would be grossly under compensated for the reasonable value of its work throughout the three-year litigation if the Court did not add at least $50,000 in fees for time expended for which no records were kept. Specifically, ABC argues that it would not be reimbursed for the time spent on preparing depositions,

responding to and propounding discovery requests, litigating several discovery disputes, and preparation of summary judgment motions, all of which "occupied most of [counsel's] time in this case over a period lasting almost a year." (ABC's Stat. at 16-18).

The Court agrees that $50,000 is reasonable, and more likely than not a rather conservative estimate of the value of the time actually rendered. [FN10] However, because ABC did not maintain contemporaneous records of this time, this award is reduced by 25%. *F.H. Kear & Co. v. Nineteen Named Trustees,* 810 F.2d 1250, 1265 (2d Cir.1987) (holding that a reduction in fees is appropriate when contemporaneous records have not been kept); *Cf. Broadcast Music,* 919 F.Supp. at 661 (awarding in-house counsel 50% of the requested attorneys' fees because no contemporaneous records were kept). Thus, the Court awards $40,137.45 (263.3 x 152.44) plus $37,500, for a total of $77,637.45, for the attorneys' time and $1,004.40 (9.3 x 108) for the paralegal's time.

> FN10. The Court also finds that not awarding any amounts above those evidenced by contemporaneous records would be inequitable. Notably, Plaintiff does not argue that ABC did not expend significant time on these tasks, but merely challenges the $50,000 as arbitrary.

c. *Costs*

ABC requests an award for $7,001.97 in costs. Plaintiff does not question the reasonableness of the amount of costs, but rather challenges ABC's claim on the basis that it did not provide proper documentation of the costs, and specifically, that it provided "no business vouchers or other documentation

for travel expenses." (Seltzer at 5). That statement is plainly refuted by the 26 pages of travel receipts and expense reports attached the ABC's declaration. (ABC's Stat. at Ex. 6). The Court has reviewed this evidence and finds that it is more than adequate. In addition, the Court finds that $7,001.97 is reasonable.

Accordingly, ABC is awarded $85,643.82 in attorneys' fees and costs.

3. *CBS*

CBS requests $74,826.20 in attorneys' fees and $3,436.78 in costs for all the legal work performed, which was done by its Law Department rather than outside counsel.

a. *Hourly Rate*

CBS requests the same $322 figure for its in-house attorneys that this Court has rejected for ABC, but does not provide any estimate of the actual cost to CBS of its in-house counsel's time. The Court therefore directs CBS to provide an estimate of the actual imputed cost of its in-house attorney's time. After reviewing this estimate, the Court will decide the proper amount of fees to award CBS.

b. *Time Billed*

Like ABC, CBS's Law Department admits that it is not their regular practice to maintain time records. Plaintiff argues that because CBS does not present contemporaneous time records, the amount that CBS requests is arbitrary and "based

on pure speculation." (Declaration of Naomi B. Waltman in Support of CBS's Application for Award of Reasonable Attorneys' Fees and Costs, July 31, 2003 ("CBS's Stat."), at 2; Pl's CBS Mem. at 2; Report of Philip Seltzer "Seltzer's CBS Rep." at 2-4).

Plaintiff's characterization is not accurate. CBS's attorney kept contemporaneous records for the legal worked performed in conjunction with the fee proceedings. The Court has reviewed these records, and approves of the 40.1 hours claimed. In addition, CBS has produced evidence, most of which consists of DWT's records of conferences and communications that involved CBS's counsel, showing that they worked at least 30 hours for the underlying proceedings. The Court finds these records reliable and adequate evidence that CBS's attorney worked these 30 hours. [FN11]

> FN11. In fact, it appears that CBS conservatively estimated its hours based on these records.

Therefore, the Court finds that CBS has produced sufficient records to support 70.1 hours.
However, like ABC, CBS requests $50,000 above whatever figure the lodestar calculation results in, because it would be undercompensated for the reasonable value of its work, including for the time spent on drafting an answer, conducting factual investigations regarding the two CBS news reports that were at issue in the underlying litigation, drafting and responding to Plaintiff's discovery requests, preparing for depositions, litigating several discovery disputes, and the preparation of lengthy and substantial summary judgment motion papers and reply memoranda.

After the Court reviews CBS's estimate of the actual imputed cost of in-house counsel, it will decide whether or to

what extend CBS should be awarded fees beyond the 70.1 hours evidenced by its records.

c. *Costs*

CBS requests reimbursement for $3,436.78 in costs. Despite Plaintiff's argument to the contrary, Plaintiff has provided adequate proof of these expenditures, including bills for deposition transcripts, document duplicating, and contemporaneous internal claim forms for travel expenses. The Court has reviewed all of the proof, and finds that the amount claimed is reasonable. The Court also notes that this amount is far less than the costs actually incurred by CBS for expenditures for telephone calls, couriers, mail, electronic legal research and other items necessary to conduct a litigation, which are all paid as part of CBS's overhead and which CBS has "no practical way" of accounting for. (CBS's Stat. at 12). Accordingly, the Court awards CBS $3,436.78 in costs.

CONCLUSION

For the reasons above, CNN is awarded $140,495.69 in attorneys' fees and $21,849 in costs, ABC is awarded ABC is awarded $78,641.85 in attorneys' fees and $7,001.97 in costs, and CBS is awarded $3,436 .78 in costs. CBS is directed to produce an estimate of the actual imputed cost of its in-house attorney's time by Tuesday, February 17, 2004. After reviewing this estimate, the Court will set the amount of CBS's award.